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Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

MICHAEL MARTINEZ TRUJILLO,

*Petitioner,*

v.

NATHANIEL QUARTERMAN,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals failed to follow *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) and similar cases from the Sixth, Seventh, Tenth, and Eleventh Circuit Courts of Appeals in denying a certificate of appealability on a claim of ineffective assistance of counsel regarding a failure to request a jury instruction on duress when evidence of duress was the sole defense presented at trial?

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Michael Martinez Trujillo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a) denying the request for a certificate of appealability is not published. *Trujillo v. Quarterman*, No. 07-50172 (5th Cir., January 16, 2008). The memorandum and recommendation of the magistrate judge at the district court level (App., *infra*, 1b) recommending denial of the Petitioner's Petition for Writ of Habeas Corpus is not published. *Trujillo v. Quarterman*, No. SA-06-CA-577-OG (W.D. Tex., November 7, 2006). The order of the district court (App., *infra*, 1c) accepting the recommendation of the magistrate judge is not published. *Trujillo v. Quarterman*, No. SA-06-CA-577-OG (W.D. Tex., January 11, 2007). The district court order denying a certificate of appealability (App., *infra*, 1d) is not published. *Trujillo v. Quarterman*, No. SA-06-CA-577-OG (W.D. Tex., April 14, 2007).

## JURISDICTION

The Court of Appeals entered its judgment on January 16, 2008. There was no motion for rehearing filed in this case. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions and statutes involved in this case are the Sixth and Fourteenth Amendments of the Constitution of the United States; and 28 U.S.C. §§ 2241, 2253, and 2254. The pertinent text of these constitutional provisions and statutes are set out at Appendix E.

## STATEMENT OF THE CASE

The Petitioner was charged in the 187th Judicial District Court of Bexar County, Texas with capital murder allegedly occurring on December 27, 2001. (T – 319-320).[1] The Petitioner entered a plea of not guilty before the jury on May 13, 2003. (R – v.7 – 1, 6). The jury found the Petitioner guilty on May 21,

[1] The clerk's record from the trial will be referred to as "T and page number." The court reporter's record from the trial will be referred to as "R and volume and page number." The court reporter's record from the state writ hearing will be referred to as "WHC and volume and page number."

2003 which resulted in an automatic life sentence. (R – v.13 – 1, 93).

The Fourth Court of Appeals, District of Texas, in an unpublished memorandum opinion, affirmed the judgment of the trial court. *Trujillo v. State*, No. 04-03-00467-CR (Tex. App. – San Antonio, July 14, 2004, no pet.). Neither a petition for discretionary review nor a petition for writ of certiorari was filed. A state application for writ of habeas corpus was filed on August 5, 2005 and was denied by the Texas Court of Criminal Appeals on June 28, 2006.

A petition for writ of habeas corpus was filed on July 3, 2006 in the United States District Court for the Western District of Texas and was denied without a hearing on January 11, 2007. Notice of appeal was timely filed on January 26, 2007. The federal district court denied a certificate of appealability on April 14, 2007. The Petitioner filed with United States Court of Appeals for the Fifth Circuit seeking a certificate of appealability as to ineffective assistance of counsel. This request was denied on January 16, 2008.

In this habeas case brought by a person in state custody, the district court had federal jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The Court of Appeals had federal jurisdiction of the appeal from the final order and judgment of the United States District Court for the Western District of Texas pursuant to 28 U.S.C. §§ 1291, 2253, 2254, and Rule 22(b) of the Federal Rules of Appellate Procedure.

In opening statement, trial defense counsel stated that Danny Gonzales, a Mexican Mafia member, shot the two complainants in the head with a .25 caliber handgun and that Adam Gomez, also a Mexican Mafia member, then shot the two complainants with a 9mm handgun. (R – v.12 – 10, 13). Counsel stated that Michael Trujillo, Steve Salgado, and Fernando Gonzales helped Danny Gonzales and Adam Gomez dispose of the bodies. *Id.* at 11. Counsel stated that Michael, Steve, and Fernando were afraid of Danny and Adam and that is why they helped dispose of the bodies. *Id.* Counsel stated that Michael was afraid for his life and that is why Michael helped dispose of the bodies and cover up the incident. *Id.* Counsel stated that Michael did not report the incident to the police because Michael was afraid that he would be shot and killed if he reported the incident. *Id.* Counsel stated that the evidence established "a pattern of intimidation and fear that was placed into Michael . . . " *Id.*

Michael's wife, Lori Trujillo, testified that after the incident, Michael was in fear for his life. (R – v.12 – 52). Fernando Gonzales testified that he met Danny Gonzales in November 2001 after Danny Gonzales was released from prison. *Id.* at 70. Fernando testified that, after the shooting, Danny Gonzales told Fernando to bring Michael back to the garage where the shooting had occurred or else Danny Gonzales and Adam Gomez would kill Michael and his family. *Id.* at 99. When Fernando returned with Michael, Adam Gomez pointed his gun at Fernando, Steve, and

Michael and told Fernando to take the keys to Valle's car and drive the car to the garage. *Id.* at 99-100. Danny Gonzales then told them to put the bodies into the car and Michael, Fernando, and Steve loaded the bodies. *Id.* at 101-102. While Danny Gonzales and Adam Gomez still had their guns, they told Fernando to drive one car and Michael to drive the other car. *Id.* at 103-104. They disposed of the bodies while Steve Salgado was told to remain at the garage and clean it. *Id.* at 107. Danny Gonzales and Adam Gomez then told Michael to drive them and Fernando to the home of the girlfriend of Danny Gonzales. *Id.* at 107-108. At the home, Danny Gonzales told Fernando and Michael that if they ever told anyone what happened, he would kill their families and them. *Id.* at 109. The next day, Danny Gonzales ordered Fernando and Michael to clean the garage. (R – v.12 – 112-113).

The trial defense counsel never requested a jury instruction for the defense of duress. The instructions read to the jury by the trial judge did not contain an instruction for the defense of duress. (R – v.13 – 25-35). During deliberations, the jury sent a note to the trial judge inquiring if the jury could consider a lesser included offense. *Id.* at 91. This was clearly not a strong case against Michael.

In the affidavit of the state direct appeal appellate counsel (App., *infra*, 1f), counsel stated that he read the reporter's record and "was immediately struck by the omission of an instruction in the court's charge on the defense of duress." *Id.* It was clear to appellate counsel, after reading the record, that

Michael became involved in this incident only because he was in imminent fear for his life or of imminent serious bodily injury from Danny Gonzales. *Id.* Appellate counsel confronted trial defense counsel about the lack of a duress instruction, and trial defense counsel seemed to be upset with himself for not requesting the duress instruction. *Id.* Appellate counsel is of the opinion that Michael received ineffective assistance of counsel given this failure to request a duress instruction. *Id.* Appellate counsel is of the opinion that this failure seriously prejudiced the defense and resulted in a loss of confidence in the outcome of the trial. *Id.* "The failure of [counsel] to prosecute the duress defense was devastating error and caused me to have serious doubts about the validity of the verdict." *Id.*

## REASONS FOR GRANTING THE PETITION

The United States Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

### I. The standard for ineffective assistance of counsel.

Effective assistance of counsel is a right guaranteed by the Sixth Amendment of the United States Constitution, applied to the States through the Fourteenth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984). Under this test, one must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* Prejudice means there is a reasonable probability that but for counsel's acts or omissions, the outcome of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* An ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the *Strickland* test. *Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995). Suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness' testimony. *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985). Prejudice analysis should not focus on determination of outcome but on whether error ensures that the result of the proceeding was fundamentally unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364, 371, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). This ineffectiveness standard was met in the case at bar and the decision of the Court of Appeals is contrary to established law.

This Court has conducted a materiality standard for a *Brady* claim which is the same showing required to demonstrate the above prejudice from counsel's deficient performance. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Materiality does not require a defendant to demonstrate by a preponderance of the evidence that the absence of the error would have ultimately resulted in an acquittal

or a life sentence. *Id.* at 1565-1566. The test is whether the error undermines confidence in the jury's sentence of death or conviction for capital murder. *Id.* at 1566. This is not a sufficiency of the evidence test – that is, the defendant is not required to demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would have been insufficient evidence remaining to convict or return a sentence of death. *Id.* The reviewing court should view the favorable evidence and determine if it reasonably puts the whole case in such a different light so as to undermine confidence in the verdict. *Id.*; *see Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness' testimony). Materiality must be assessed in terms of the suppressed evidence considered as a whole, not item by item. *Kyles v. Whitley*, *supra*, 115 S.Ct. at 1567. Prejudice under *Strickland* should be considered in the same manner. *See also Westley v. Johnson*, 83 F.3d 714, 719 (5th Cir. 1996) (prejudice analysis should not focus on determination of outcome but on whether error ensures that the result of the proceeding was fundamentally unfair or unreliable); *Lockhart v. Fretwell*, 506 U.S. 364, 371, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

## II. The standard for granting a certificate of appealability (COA).

"[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition,

the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1034, 154 L.Ed.2d 931 (2003), *citing Slack v. McDaniel*, 529 U.S. 473, 481, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Pursuant to 28 U.S.C. § 2253(c)(2), *"a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.'" Miller-El v. Cockrell, supra*, 123 S.Ct. at 1034. (Emphasis added). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id., citing Slack v. McDaniel, supra*, 529 U.S. at 484.

In determining whether to issue a COA, an appellate court must conduct an overview of the claims in the habeas petition and a general assessment of the claims' merits. *Miller-El v. Cockrell, supra*, 123 S.Ct. at 1039. An appellate court will "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Id. The Petitioner is not required to establish the appeal will succeed. Id.* (Emphasis added). "Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* "It is consistent with § 2253 that a COA

will issue in some instances where there is no certainty of ultimate relief." *Id.*

"A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El v. Cockrell, supra*, 123 S.Ct. at 1040, *citing Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). For the issuance of a COA, it is not required that the Petitioner prove that some jurists would grant the habeas petition. *Miller-El v. Cockrell, supra*, 123 S.Ct. at 1040. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* The Petitioner in the case at bar has made a claim that is debatable among jurists of reason regarding trial defense counsel's failure to request a jury instruction on duress.

*In applying the COA requirement, a reviewing court resolves "any doubt about entitlement to a COA in favor of granting it." Sonnier v. Johnson*, 161 F.3d 941, 944 (5th Cir. 1998). (Emphasis added). "Should we have any doubt about issuing a COA . . . we shall grant it." *Whitehead v. Johnson*, 157 F.3d 384, 386 (5th Cir. 1998). For the reasons set forth below, this case meets the *Barefoot* standard, and the Petitioner was entitled to the issuance of a COA.

## III. A COA should have been granted for the failure to request a jury instruction on duress.

Section 8.05 of the Texas Penal Code states that, "It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." Compulsion exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure. *Id.* The claim of duress must have an objective, reasonable basis. *Bernal v. State,* 647 S.W.2d 699, 706 (Tex. App. – San Antonio 1982, no pet.) (defendant's fear that co-defendant *might* get violent if defendant did not "take his turn" in rape held not sufficient to raise defense of duress). (Emphasis added). It is not enough to think violence might occur where no actual threats have been made. The threats must have been made to the extent that an actor had a reasonable fear for his life or the life of his family. *Alford v. State*, 806 S.W.2d 581, 584 (Tex. App. – Dallas 1991). *A defendant is entitled to an affirmative defensive instruction on every issue raised by the evidence, regardless of whether it is strong, feeble, unimpeached, or contradicted,* and even if the trial court is of the opinion the testimony is not entitled to belief. *Booth v. State*, 679 S.W.2d 498 (Tex. Crim. App. 1984). (Emphasis added).

A jury instruction regarding duress is required in a case such as the case at bar where a defendant and his family had been threatened by gang members, the

defendant owed a complainant money for drugs, the complainant owed the gang money for selling the drugs, the defendant invited the complainant and gang members to his home, gang members shot and killed the complainants at the home of the defendant, the defendant did not seem surprised when the complainants were shot by the gang members, and the defendant was in fear for his life after the shootings and was forced by the gang members to help dispose of the bodies of the complainants.

In the case at bar, the position put forth by trial defense counsel and the developed evidence made clear that the Petitioner, Michael, was afraid of Danny Gonzales and had good reason to be afraid. In opening statement, trial defense counsel stated that Danny Gonzales, a Mexican Mafia member, shot the two complainants in the head with a 25 caliber handgun and that Adam Gomez, also a Mexican Mafia member, then shot the two complainants with a 9mm handgun. (R – v.12 – 10, 13). Counsel stated that Michael Trujillo, Steve Salgado, and Fernando Gonzales helped Danny Gonzales and Adam Gomez dispose of the bodies. *Id.* at 11. Counsel stated that *Michael, Steve, and Fernando were afraid of Danny and Adam* and that is why they helped dispose of the bodies. *Id.* Counsel stated that *Michael was afraid for his life and that is why Michael helped dispose of the bodies* and cover up the incident. *Id.* Counsel stated that *Michael did not report the incident to the police because Michael was afraid that he would be shot and killed* if he reported the incident. *Id.* Counsel stated

that the evidence established "a pattern of intimidation and fear that was placed into Michael . . . " *Id.* The groundwork for a duress instruction was proffered by trial defense counsel at the beginning of trial, and counsel admitted Michael's involvement while offering the jury an explanation for Michael's fear of Danny Gonzales and Adam Gomez.

Trial testimony indicated that Michael owed a complainant money for drugs. (R – v.7 – 30-35). Michael brought one of the shooters, Adam, to Michael's house. (R – v.9 – 138-149). After Michael had the complainants come to his house, they were shot to death by Adam in the presence of Michael and Steve Salgado and others. *Id.* at 138-256. *Testimony indicated that Michael acted nervous and scared* but turned on the radio and shut off the lights. *Id.* Steve Salgado testified at trial *that Michael told Salgado that Michael was sorry that Salgado saw the murders, that Salgado was in the wrong place during the murders,* ***and that Michael and his family had been threatened***. (R – v.9 – 178). Salgado testified that Michael did not seem surprised when Adam produced a gun and shot the complainants. *Id.* at 235-237. This fear and evidence of threats against Michael and his family indicate they were made ***prior*** to any criminal activity on the date of offense. This testimonial evidence alone is sufficient to place duress in issue in this case deserving of a proper jury instruction on the defense of duress.

Michael's wife, Lori Trujillo, testified that *after the incident, Michael continued to be in fear for his*

*life.* (R – v.12 – 52). Fernando Gonzales testified that he met Danny Gonzales in November 2001 after Danny Gonzales was released from prison. *Id.* at 70. Fernando testified that, after the shooting, *Danny Gonzales told Fernando to bring Michael back to the garage where the shooting had occurred or else Danny Gonzales and Adam Gomez would kill Michael and his family. Id.* at 99. When Fernando returned with Michael, *Adam Gomez pointed his gun at Fernando, Steve,* ***and Michael*** and told Fernando to take the keys to Valle's car and drive the car to the garage. *Id.* at 99-100. This testimony is further evidence of continuing actions on Michael's part while under duress. Danny Gonzales then told them to put the bodies into the car and Michael, Fernando, and Steve loaded the bodies. *Id.* at 101-102.

While Danny Gonzales and Adam Gomez still had their guns, they told Fernando to drive one car and Michael to drive the other car. *Id.* at 103-104. They disposed of the bodies while Steve Salgado was told to remain at the garage and clean it. *Id.* at 107. Danny Gonzales and Adam Gomez then told Michael to drive them and Fernando to the home of the girlfriend of Danny Gonzales. *Id.* at 107-108. At the home, *Danny Gonzales told Fernando and Michael that if they ever told anyone what happened, he would kill their families and them. Id.* at 109. The next day, *Danny Gonzales ordered Fernando and Michael to clean the garage.* (R – v.12 – 112-113). The testimony provides clear evidence that Michael was acting

under duress throughout any participation in criminal activity.

Under these facts, trial defense counsel should have requested a jury instruction on duress. There was no strategic reason not to request a duress instruction. The complete failure to do so is deficient performance, since sufficient evidence of duress was before the court and the jury. The instructions read to the jury by the trial judge did not contain an instruction for the defense of duress. (R – v.13 – 25-35). During deliberations, the jury sent a note to the trial judge inquiring if the jury could consider a lesser included offense. *Id.* at 91. This note is indicative of how weak the case was against Michael.

In his affidavit (App., *infra*, 1f), appellate counsel noted the absence of the duress instruction given the evidence at trial. Appellate counsel read the reporter's record and "was immediately struck by the omission of an instruction in the court's charge on the defense of duress." *Id.* It was clear to appellate counsel, after reading the record, that Michael became involved in this incident only because he was in imminent fear for his life or of imminent serious bodily injury from Danny Gonzales. *Id.* Appellate counsel confronted trial defense counsel about the lack of a duress instruction, *and trial defense counsel seemed to be upset with himself for not requesting the duress instruction. Id.* Appellate counsel is of the opinion that Michael received ineffective assistance of counsel given this failure to request a duress instruction. *Id.* Appellate counsel is of the opinion that this

failure seriously prejudiced the defense and results in a loss of confidence in the outcome of the trial. *Id.* "The failure of [counsel] to prosecute the duress defense was devastating error and caused me to have serious doubts about the validity of the verdict." *Id.*

A jury instruction regarding duress was required in this case where Michael and his family had been threatened by gang members, Michael owed a complainant money for drugs, the complainant owed the gang money for selling the drugs, Michael invited the complainant and gang members to his home, gang members shot and killed the complainants at Michael's home, Michael did not seem surprised when the complainants were shot by the gang members, and Michael was in fear for his life after the shootings and was forced by the gang members to help dispose of the bodies of the complainants.

Trial defense counsel failed to consider or request a jury instruction regarding duress and this failure was deficient performance. The failure to request a duress instruction in this case seriously prejudiced the defense and resulted in a loss of confidence in the outcome of the trial especially since the jury sent out a note inquiring if it could consider a lesser included offense rather than capital murder. The jury was looking for some way out of convicting Michael for capital murder. But for this deficient performance, the result of the proceeding would have been different, because the jurors would have received a legal instruction that placed Michael's action in context and the jurors were seeking to find him guilty of a

lesser included offense as indicated by the note sent by them. The Petitioner has demonstrated ineffective assistance of counsel.

## IV. The Fifth Circuit decided this case contrary to *Miller-El* and the Sixth, Seventh, Tenth, and Eleventh Circuit Courts of Appeals.

The threshold question here is the debatability of this underlying constitutional claim, not the resolution of that debate. *See Miller-El v. Cockrell*, *supra*, 123 S.Ct. at 1042. The district court's denial of this ineffective assistance of counsel claim is "debatable amongst jurists of reason." A certificate of appealability regarding this claim should have issued. The Fifth Circuit Court of Appeals failed to follow *Miller-El* in its failure to give adequate consideration to the ineffective assistance of counsel issue.

The January 16, 2008 order of the Court of Appeals denying Michael's appeal (App., *infra*, 1a), was eleven lines long. Only five lines dealt with the ineffective assistance of counsel issue. *Id.* at 1-2. There is a complete omission of any reference to *Strickland* or the standard for ineffective assistance of counsel. *Id.* The Fifth Circuit acknowledged that Michael argued that trial defense counsel was ineffective for failing to request a duress jury instruction. *Id.* at 1. The order then makes the declaration that there has been no showing that jurists of reason would find it debatable whether the lower district court was correct in its ruling and then summarily denies a certificate of

appealability. *Id.* at 2. No analysis is presented in the order. Other circuits have granted certificates of appealability in cases where ineffective assistance of counsel was raised in regards to jury instruction issues.

In *Jones v. McDonough*, it was argued that counsel's failure to rely on a Florida case (which held that a jury instruction on consciousness of guilt based on evidence of flight was an impermissible judicial comment on the weight of the evidence) while objecting to a jury instruction was ineffective assistance of counsel under *Strickland*. *Jones v. McDonough*, 2007 U.S. App. LEXIS 1488 (11th Cir., January 24, 2007) (unpublished). The district court granted a certificate of appealability as to whether trial counsel's performance was deficient for failing to make this objection to the jury instruction. In the case at bar, the Petitioner, Michael, requested that the Court of Appeals grant him a certificate of appealability regarding whether counsel was ineffective in failing to request a duress instruction when that was the defense at trial. Absolutely no reason was given by the Court of Appeals regarding why a COA should not be granted or why Michael's case was different from *Jones v. McDonough*.

In *Thompson v. Konteh*, the federal district court denied the Petitioner's writ of habeas corpus for his conviction in an aggravated murder case and denied a certificate of appealability. *Thompson v. Konteh*, 2006 U.S. App. LEXIS 6252 (6th Cir., March 14, 2006) (partial publication). Thompson then sought a

certificate of appealability from the Sixth Circuit Court of Appeals, which was granted on the issue of whether Thompson was denied effective assistance of counsel for failing to object to an erroneous jury instruction. *Id.* At trial, no objections were made by defense counsel to the submitted instructions. *Id.* The court examined the instructions for proper application of the law regarding Thompson's arguments that he was convicted without proof of the requisite culpable mental state and that the instructions did not require a unanimous decision on behalf of the jury. *Id.* In the case at bar, the Petitioner, Michael, requested that the Court of Appeals grant him a certificate of appealability regarding whether counsel was ineffective in failing to request a duress instruction when that was the defense at trial. Absolutely no reason was given by the Court of Appeals regarding why a COA should not be granted or why Michael's case was different from *Thompson v. Konteh.*

In *United States v. Demeree*, the Petitioner's application for a certificate of appealability was denied by the district court. The Tenth Circuit Court of Appeals, however, granted her a certificate of appealability on the sole issue of whether the lack of a jury instruction requiring unanimous jury consent violated *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), and whether counsel's failure to request such an instruction constituted ineffective assistance of counsel. *United States v. Demeree*, 2004 U.S. App. LEXIS 18508 (10th Cir., September 1, 2004) (unpublished). The court found that Demeree's

counsel was in fact ineffective for failing to request an instruction requiring jury unanimity as to the predicate violations undergirding her conviction, since the instructions given at trial did meet the requirements of *Richardson*. *Id.* *Richardson* had not yet been decided at the time of the Petitioner's trial, but a claim of ineffective assistance of counsel was made by her because another circuit had recognized the importance of such an instruction to correctly establish a continuing criminal enterprise conviction. *Id.* In the case at bar, the Petitioner, Michael, requested that the Court of Appeals grant him a certificate of appealability regarding whether counsel was ineffective in failing to request a duress instruction when that was the defense at trial. Absolutely no reason was given by the Court of Appeals regarding why a COA should not be granted or why Michael's case was different from *United States v. Demeree*.

In *Perry v. McCaughtry*, the Petitioner was sentenced to life in prison for his role as a party to a murder. *Perry v. McCaughtry*, 308 F.3d 682 (7th Cir. 2002). Perry exhausted his appeals in the state system and filed a writ of habeas corpus alleging ineffective assistance of counsel. *Id.* His petition was denied and he appealed after the district court granted him a certificate of appealability on the issue that his counsel was ineffective for failing to ensure that the jury instruction on "party to a crime" liability included a reference to the lesser included offense of felony murder. *Id.* Perry's claim was that the jury had no basis to find him a party to any other offense and were limited by the submitted instructions to first

degree murder, which acted to his detriment. In the case at bar, the Petitioner, Michael, requested that the Court of Appeals grant him a certificate of appealability regarding whether counsel was ineffective in failing to request a duress instruction when that was the defense at trial. Absolutely no reason was given by the Court of Appeals regarding why a COA should not be granted or why Michael's case was different from *Perry v. McCaughtry*.

The Petitioner's ineffective assistance of counsel claim for a failure of trial defense counsel to request a duress instruction satisfies the *Miller-El* standard. *See Miller-El, supra*, 537 U.S. 322. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

In the above-cited cases, certificates were granted, and all the Petitioners were permitted to appeal their jury instruction issue in the ineffective assistance of counsel context. Michael Trujillo should have received the same opportunity, particularly in a case where the evidence for duress was evident from the record. The Petitioner in the case at bar has made a claim that is debatable among jurists of reason regarding trial defense counsel's failure to request a jury instruction on duress and the Court of Appeals was incorrect to label the claim not subject to debate.

It is worth noting that a certificate of appealability involving the investigation into a possible duress

issue in an ineffective assistance of counsel context was granted in another circuit and was later determined to have merit. *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006). In *Dando*, the Petitioner was involved in a crime spree with her boyfriend and pled no contest to several robbery counts on advice of appointed trial counsel and later sought to vacate her pleas. *Id.* She filed a habeas petition challenging the state court's denial of her request for a mental health expert and an ineffective assistance of counsel claim for counsel's failure to pursue a duress defense. *Id.* Dando submitted evidence through appointed appellate counsel of a history of sexual and physical abuse and claimed abuse from the male co-defendant *Id.* The ineffective assistance of counsel claim was that no investigation was done regarding duress as a potential defense to her criminal liability given her history as a "battered woman." *Id.* The court ultimately found trial counsel's failure to investigate and pursue duress as a defense to be ineffective assistance of counsel. The court noted:

> The fact that Dando received a relatively lenient sentence in exchange for her no contest plea does not render the failure to investigate Battered Women's Syndrome and duress a sound professional judgment. The state court praised the decision by trial counsel to raise Dando's abuse in obtaining a shorter sentence. However, had counsel investigated the potential defenses and pursued them at trial, *Dando would have had a chance to be acquitted altogether*, or convicted of only

> some of the counts charged and acquitted of others (perhaps if the jury found the duress to be more immediate during particular portions of the crime spree).

*Id.* at 800 (Emphasis added).

This same rationale and conclusion apply to the case at bar. The failure to pursue duress in a special requested jury instruction when there was evidence of duress to support such an instruction greatly prejudiced Michael. Appellate counsel in his affidavit (App., *infra*, 1f) deemed this error "devastating" to Michael's defense at trial. The jury had no instruction on which to rely so as to support their inclination to hold Michael to a much lesser degree of culpability given the evidence they received. They certainly had no instructions to guide them as to duress.

Had trial defense counsel requested a duress jury instruction given the evidence before the jury, there stood a chance that Michael would have been acquitted for his role in the charged offense. During deliberations, the jury sent a note to the trial judge inquiring if the jury could consider a lesser included offense (R – v.13 – 91). This note is indicative of both their inclination to seek out on their own some means to shield Michael from conviction of the charged offense and of how weak the case was against Michael. The purpose behind the defense of duress is to demonstrate that one's actions are the result of coercion and not voluntary conduct with criminal *mens rea*. In the instant case, testimony was heard

*that Michael acted nervous and scared* and that *Michael and his family had been threatened.* (R – v.9 – 138-256). Fernando testified that, after the shooting, *Danny Gonzales told Fernando to bring Michael back to the garage where the shooting had occurred or else Danny Gonzales and Adam Gomez would kill Michael and his family. Id.* at 99. When Fernando returned with Michael, *Adam Gomez pointed his gun at Fernando, Steve,* ***and Michael*** and told Fernando to take the keys to Valle's car and drive the car to the garage. *Id.* at 99-100. Prior to and after the crime, Michael and his family were being threatened, and this fact was not lost on the jurors given the note they sent to the judge during their deliberations. There is room for jurists of reason to debate this duress jury instruction issue.

The Court of Appeals, unlike the Sixth, Seventh, Tenth, and Eleventh Circuit Courts of Appeals, failed to give adequate consideration to the ineffective assistance of counsel issue. The court appeared to rely on the order from the district court (App., *infra*, 1c), that in turn, relied on the magistrate judge's memorandum and recommendation (App., *infra*, 1b), which was adopted by the district court. This memorandum, however, focuses only on evidence of duress after the murders and fails to address any evidence of duress that was shown to have occurred prior to the murders. This limited view of the trial evidence is incomplete and cannot be used to support a rationale of effective performance, let alone a decision not to

grant a COA, given the complete record and the evidence presented.

The court noted in its order (App., *infra*, 1b) that "the chosen strategy was in direct contradiction to the defense of duress, which required Trujillo to admit that he committed the offense but did so involuntarily." *Id.* at 7. The interpretation of the record was that since a party instruction was included in the charge, the strategy must have been to show that the Petitioner was not involved in the crime at all. *Id.* This strategy, however, was never discussed. Appellate counsel's affidavit (App., *infra*, 1f) shows that trial defense counsel never once considered duress given his reaction after the omission was brought to his attention. No discussion on duress was possible because trial defense counsel never thought of a duress instruction in the first place.

The magistrate's memorandum (App., *infra*, 1b) goes on to interpret the Petitioner's claim of failure to request a duress instruction as now offering an alternate defense. This too is incorrect since the Petitioner's position is that *a jury instruction on duress should have been requested under the evidence presented*, because the jury was not firmly convinced of the Petitioner's guilt. (R – v.13 – 91). The jury could have considered a duress instruction without argument from either side on the matter, since the jury had begun considering lesser included instructions on their own. It is not an alternate defense, but rather was a defense that was offered to the jury throughout

trial, but was never instructed on, to the detriment of the Petitioner.

Sufficient evidence of duress was presented at trial. Trial defense counsel was deficient in his performance for failing to request a duress instruction. But for this deficient performance, the outcome of this case as to the Petitioner may have been different. The Petitioner's constitutional right to effective assistance of trial counsel was violated. A prisoner seeking a certificate of appealability need only demonstrate "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, *supra*, 123 S.Ct. at 1034. "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*, *citing Slack v. McDaniel*, *supra*, 529 U.S. at 484. The Petitioner has satisfied this standard. A certificate of appealability regarding this claim should have issued.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(210) 354-1919
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# APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 07-50172
USDC No. 5:06-CV-577

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MICHAEL MARTINEZ TRUJILLO

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

---

Appeal from the United States District Court for the Western District of Texas

---

(Filed Jan. 16, 2008)

ORDER:

Michael Martinez Trujillo, Texas prisoner # XXXXXXX, moves this court for a certificate of appealability (COA) from the denial of his 28 U.S.C. § 2254 petition in which he challenged his capital murder conviction. Trujillo does not address the district court's determination that his claim of grand

jury discrimination was procedurally barred and that his jury misconduct claim was without merit. Therefore, Trujillo has abandoned these claims. *See Hughes v. Johnson,* 191 F.3d 607, 613 (5th Cir. 1999).

Trujillo argues that counsel was ineffective for failing to request a duress jury instruction. Trujillo has not shown that jurists of reason would find it debatable whether the district court was correct in its ruling. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Accordingly, Trujillo's motion for a COA is DENIED.

Priscilla R. Owen
PRISCILLA R. OWEN
UNITED STATES
CIRCUIT JUDGE

## APPENDIX B

## UNITED STATES DISTRICT COURT
## WESTERN DISTRICT OF TEXAS
## SAN ANTONIO DIVISION

| | | |
|---|---|---|
| **MICHAEL MARTINEZ TRUJILLO,** | * | |
| **Petitioner,** | * | |
| **v.** | * | **CIVIL NO.** |
| **NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Inst. Division,** | * | **SA-06-CA-0577-OG** |
| **Respondent.** | * | |

### MEMORANDUM AND RECOMMENDATION

(Filed Nov. 7, 2006)

Michael Martinez Trujillo, an inmate in the custody of the Texas Department of Criminal Justice-Correctional Institutions Division ("TDCJ-CID"), has filed an application for a writ of habeas corpus, pursuant to 28 U.S.C. Section 2254, challenging his state court conviction for capital murder. Petitioner alleges that (1) he received ineffective assistance of counsel at trial, (2) the grand jury was not composed of a fair cross section of the community, and (3) the jury engaged in misconduct. Respondent has filed an answer (docket no. 10), to which answer petitioner has not responded. Having considered the pleadings, the state court records, and the applicable law, the

Court is of the opinion this habeas petition should be denied.

## Background

Trujillo was found guilty of capital murder by a jury in the 187th Judicial District Court of Bexar County, Texas, cause no. 2002-CR-3469B. On May 21, 2003, he was sentenced to a term of life imprisonment in the TDCJ-CID. His conviction was affirmed by the Texas Fourth Court of Appeals on July 14, 2004. Trujillo did not file a petition for discretionary review with the Texas Court of Criminal Appeals. On August 5, 2005, petitioner filed a state habeas application under Article 11.07 of the Teas Code of Criminal Procedure. The Texas Court of Criminal Appeals denied the application on June 28, 2006. This federal habeas application was filed July 3, 2006.

## Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner may not obtain relief with respect to a claim adjudicated on the merits in state court unless the adjudication (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly-established federal law, as announced by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. **Title 28 U.S.C. Section 2254(d).** A

decision is contrary to clearly-established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. ***Williams v. Taylor***, 529 U.S. 362, 405-06 (2000). It is not enough that the state court applied clearly-established federal law incorrectly. ***Id.*** at 411. A state-court decision involves an unreasonable application of clearly established precedent if the state court applies Supreme Court precedents to the facts in an objectively unreasonable manner. ***Brown v. Payton***, 544 U.S. 133, 141 (2005).

## Analysis

### 1. Ineffective Assistance of Counsel

To obtain habeas relief on a claim of ineffective assistance of counsel, the petitioner must demonstrate that his counsel was deficient and that the deficiency prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant carries the burden of proof and must overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. ***Id.*** at 689-91. An error by counsel, even if professionally unreasonable, must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. ***Id.*** at 692. The mere

possibility of a different outcome is not sufficient to prove prejudice. ***Johnson v. Cockrell***, 301 F.3d 234, 239 (5th Cir. 2002). The petitioner must prove that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993).

Trujillo asserts that the evidence establishes that Danny Gonzales and Adam Gomez shot and killed Jose Manjarrez and Steve Valle on December 27, 2001, and that he, Steve Salgado and Fernando Gonzales were forced by Danny and Adam to help dispose of the bodies under fear of death to themselves and their families. **Reporter's Record**, Vol. XII, p. 11. Trujillo's wife testified at trial that Trujillo was in fear for the lives of his family. ***Id.***, 52. Fernando testified that Danny and Adam killed Manjarrez and Valle in Trujillo's garage. ***Id.***, pp. 94-98. While pointing a gun at Steve and Fernando, Danny ordered Fernando to find Trujillo, who had gone into his house, or else they would kill Trujillo's family. ***Id.***, p. 99.

Fernando and Steve were directed to load the bodies in Manjarrez's Lexus. **Reporter's Record**, Vol. XII, pp. 100-03. Trujillo assisted. ***Id.***, p. 102. Three vehicles departed the scene of the murder – Danny and Adam in the front vehicle, with Fernando behind them in the Lexus with the bodies, followed by Trujillo in his own vehicle. ***Id.***, pp. 104-05. They drove to the General Hudnell area where Danny directed Fernando to park the car. ***Id.***, pp. 105-06. Fernando

got into Trujillo's vehicle, and all of the men went back to Trujillo's house. ***Id.***, pp. 106-07. They picked up Steve, who stayed behind to clean the garage, and then drove to the house of Danny's girlfriend. ***Id.***, p. 107. Danny told Fernando and Trujillo that if they ever told anyone, they would kill them and their families. ***Id.***, p. 109. The next day, Fernando and Trujillo were told to clean the blood from the garage. ***Id.***, p. 13.

In this Section 2254 habeas application, Trujillo asserts that, in opening arguments, his trial attorney advised the jury that Trujillo was forced to dispose of the bodies. Trujillo complains that, despite the evidence of coercion, his trial attorney did not request a jury instruction on the defense of duress. This issue was raised and addressed in Trujillo's state habeas application. The state habeas court entered an Order noting that Trujillo's trial attorney, H. Todd McCray, testified by affidavit that he discussed trial strategy with Trujillo on numerous occasions, and that they determined that the best strategy was to convince the jury that Trujillo did not participate in the events leading up to the shooting or the acts constituting essential elements of the offense. **State Habeas Record**, pp. 173-77. They also intended to show that Trujillo's acts after the murders were involuntary. The state habeas court found that the chosen strategy was in direct contradiction to the defense of duress, which required Trujillo to admit that he committed the offense but did so involuntarily. The Court referred to the affidavit of Alex Scharff, Trujillo's appellate

attorney, who believed that the duress defense instruction should have been requested. The state habeas court concluded that defense counsel's decision was a matter of trial strategy and did not constitute ineffective assistance. The Texas Court of Criminal Appeals denied Trujillo's habeas petition without a written order based upon the findings of the trial court.

In evaluating a claim of ineffective assistance, judicial scrutiny of counsel's performance must be highly deferential ***Strickland v. Washington***, 466 U.S. at 689. Courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id.*** Especially relevant here is the mandate that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. ***Id.*** at 690; ***Ransom v. Johnson***, 126 F.3d 716, 721 (5th Cir. 1997) (tactical and strategic decisions of counsel, based on informed and reasoned practical judgment, will not be second-guessed). Clearly, the decision of McCray to pursue the defense that Trujillo did not participate in the events leading up to the shooting or the acts constituting essential elements of the offense, is a matter of trial strategy. Also, it is undisputed that this decision was made with Trujillo's assent. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. ***Id.***, at 691. Trujillo has not satisfied his heavy burden

of overcoming the presumption that McCray's actions were reasonable.

The state habeas court correctly found that the chosen strategy was in direct contradiction to the defense of duress, which required Trujillo to admit that he committed the offense but did so involuntarily. As respondent notes, the State sought to prove that Trujillo was involved in a scheme or plan to murder Manjarrez and Valle even though he did not shoot the victims himself. Evidence of his actions after the murder in disposing of the bodies was offered to permit the jury to infer Trujillo's prior involvement. The jury in this case was instructed concerning the elements of murder under Texas law. **Clerk's Record**, Vol. 2, pp. 288-99. Based upon the facts presented at trial, the jury was also charged on the law of parties. ***Id.*** Under Section 7.02(a)(2) of the Texas Penal Code, Trujillo could be found guilty as a party to the murders only if he acted with the intent to promote or assist in the commission of the offenses. The jury was asked to determine whether Adam Gomez and others murdered Steven Valle and whether Trujillo, acting with the intent to promote or assist in the commission of the murder, did solicit, encourage, direct, aid, or attempt to aid Gomez. McCray and Trujillo chose to require the State to prove this allegation beyond a reasonable doubt. In support of that defense, McCray obtained an instruction to the jury that mere presence at the scene of a crime is insufficient to make a person a party to the offense.

The alternative defense, now suggested by Trujillo, was that he did act with the intent to promote or assist in the commission of the murder of Valie by soliciting, encouraging, directing, aiding, or attempting to aid Gomez but that he did so under duress. To be entitled to the defense of duress, under Section 8.05(a) of the Texas Penal Code, Trujillo must admit he engaged in the proscribed conduct, but did so under threat of death or serious injury to himself or another. Not only is that position contrary to the defense presented at trial, Trujillo cites no evidence establishing that he was coerced into aiding in Valle's murder. The evidence cited above indicates that threats by Danny and Adam against Trujillo and his family were made *after* the commission of the murders. These facts are consistent with the chosen defense strategy.

In making its decision, the state habeas court chose to credit the testimony of McCray concerning his strategic choice over the affidavit of Scharff that the duress instruction should have been requested. Such credibility determinations by the state habeas court must be afforded deference. ***Coleman v. Quarterman***, 456 F.3d 537, 541 (5th Cir. 2006). Also, as noted above, the state habeas court concluded that McCray's decision was a matter of trial strategy. A determination of a factual issue by a State court shall be presumed to be correct and can only be rebutted by clear and convincing evidence. **Title 28 U.S.C. Section 2254(e)(1).** Trujillo has not satisfied that standard. The determination by the state habeas courts

that Trujillo was not denied the effective assistance of counsel, is not contrary to and did not involve an unreasonable application of clearly-established federal law.

**2. Fair Cross Section**

Next, Trujillo alleges that the grand jury that returned the indictment against him was not composed of a fair cross section of the community. He states that of the 14 persons on the grand jury that indicted him in May 2002, only 5 had Hispanic surnames. The list of prospective jurors from which these 14 were chosen is unavailable. Trujillo states that, as of 2003, Hispanics comprised 54.3% of the population of Bexar County, Texas. On average, 34% of the grand jurors chosen from 1990 to 2002 had Hispanic surnames. Trujillo claims that this disparity demonstrates that his grand jury was not chosen from a fair cross section of the community.

As respondent points out, this claim has been procedurally defaulted. The state habeas courts found that Trujillo had the opportunity but failed to challenge the grand jury array in a motion to quash the indictment prior to trial, as required by Texas law. If a state judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision, federal review of an issue of federal law is foreclosed. ***Harris v. Reed***, 489 U.S. 255, 260 (1989). Procedural default bars consideration of a federal claim on either direct

or habeas review if the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. ***Id.*** at 263; ***Coleman v. Thompson***, 501 U.S. 722, 729-30 (1991). A federal court reviewing a state prisoner's habeas claim must respect a state court's determination that the claim is procedurally barred under state law. ***Williams v. Cain***, 125 F.3d 269, 275 (5th Cir. 1997).

The fact that the Texas Court of Criminal Appeals did not explain the reasons for its decision does not preclude application of the procedural bar. If the last reasoned opinion invokes a procedural bar, then it is presumed that subsequent, unexplained decisions rested upon the same basis. ***Ylst v. Nunnemaker***, 501 U.S. 797, 803 (1991). Thus, in Texas, when the trial court renders a finding of procedural default on an issue raised in a state habeas petition and the Texas Court of Criminal Appeals denies the petition based upon the findings of the trial court, the procedural bar applies. ***Corwin v. Johnson***, 150 F.3d 467, 473 (5th Cir. 1998).

A claim that the method of selecting jurors systematically underrepresented Hispanics can be procedurally defaulted. ***Soria v. Johnson***, 207 F.3d 232, 249 (5th Cir. 2000); ***Cervantes Salazar v. Dretke***, 393 F.Supp.2d 451, 472-73 (W.D.Tex. 2005). Article 19.27 of the Texas Code of Criminal Procedure provides that, generally, the exclusive means for challenging the array of jurors in a grand jury is to present the challenge before the grand jury has been

impaneled. However, if challenge at this early date is impossible, as when the offense occurs after the grand jury is impaneled, the array can be attacked in a motion to quash the indictment before trial commences. ***Muniz v. State***, 672 S.W.2d 804, 807 (Tex.Crim.App. 1984). In ***Salazar***, as here, the state trial court concluded petitioner had procedurally defaulted his complaint regarding the composition of his grand jury by failing to present that claim in a pretrial motion to quash the indictment. 393 F.Supp.2d at 471-72. The ***Salazar*** Court also found that this rule has been a firmly-established principle of Texas law since 1979. ***Id.*** Thus, Salazar was procedurally barred from challenging the composition of the grand jury in a federal habeas proceeding. ***Id.*** Trujillo's failure to challenge the composition of the grand jury in accordance with Texas law, and the state habeas courts' determination that such failure caused the grand jury composition claim to be defaulted, preclude review of that claim in this Section 2254 proceeding. Trujillo can overcome this procedural bar if he can demonstrate cause for his default and actual prejudice as a result of the alleged violation of federal law, or show that failure to consider his claims would result in a fundamental miscarriage of justice. ***Coleman v. Thompson***, 501 U.S. 722, 750 (1991). However, he has made no attempt to do so.

**3. Jury Misconduct**

In his final claim, Trujillo asserts that venireman George Edward Carter, Jr. misrepresented on his

juror information card that he had never been accused in a criminal case. In fact, Carter was convicted in 1986 in Bexar County Court-At-Law of driving while intoxicated. During voir dire, Carter expressed an inclination not to grant probation in a murder case. Defense counsel's challenge for cause on that basis was denied by the trial court. Carter was a member of the jury that convicted Trujillo of capital murder.

To obtain a new trial on the basis of misinformation provided by a prospective juror, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause, ***McDonough Power Equipment, Inc. v. Greenwood***, 464 U.S. 548, 556 (1984). The defendant must demonstrate that the juror was actually biased or fundamentally incompetent. ***United States v. Bishop***, 264 F.3d 535, 554 (5th Cir. 2001). This standard is also applied in federal habeas cases. ***Montoya v. Scott***, 55 F.3d 405, 418-19 (5th Cir. 1995). The state habeas court denied this claim, finding that Carter's false response did not hide prejudice or bias against Trujillo.

Trujillo has not satisfied either ***McDonough*** factor. Whether Carter had a prior conviction for misdemeanor driving while intoxicated was not a material fact in this case. Also, Trujillo has not demonstrated that, had this information been known, Carter would have been subject to a challenge for

cause. Under Section 62.102 of the Texas Government Code, as it existed at the time of Trujillo's trial, only conviction for a felony disqualified an individual from serving as a juror. ***Cf. Jackson v. State of Alabama State Tenure Com'n***, 405 F.3d 1276, 1288 (11th Cir. 2005) (a question about prior felony convictions is material to jury service and an honest answer would provide a basis to challenge the juror for cause). ***See United States v. Ross***, 263 F.3d 844, 847 (8th Cir. 2001) (a juror's previous brushes with the law is more likely to create a bias in favor of defendants in general). Most importantly, his prior conviction revealed no bias or prejudice against Trujillo. The determination by the state habeas courts that Trujillo was not entitled to reversal and a new trial based upon Carter's failure to disclose his prior conviction for driving while intoxicated, is not contrary to and did not involve an unreasonable application of clearly-established federal law.

## Recommendation

It is, therefore, the recommendation of the Magistrate Judge that Trujillo's Section 2254 habeas application be **DENIED**.

## Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this United States Magistrate Judge's Memorandum and Recommendation on all parties by either

(1) electronic transmittal to all parties represented by attorneys registered as a "Filing User" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall File the objections with the Clerk of Court and serve the objections on all other parties and the Magistrate Judge.*** A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a ***de novo*** determination by the district court. ***See Thomas v. Arn***, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected – to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United Services Automobile Association***, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

It is so **ORDERED**.

**SIGNED** November 7, 2006.

/s/ John W. Primomo
JOHN W. PRIMOMO
UNITED STATES
MAGISTRATE JUDGE

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**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **MICHAEL MARTINEZ TRUJILLO,** | * | |
| **Petitioner,** | * | |
| **v.** | * | **CIVIL NO.** |
| **NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Inst. Division,** | * | **SA-06-CA-0577-OG** |
| **Respondent.** | * | |

**ORDER**

(Filed Nov. 7, 2006)

All matters for which this cause was referred to the Magistrate Judge having been considered and acted upon;

It is **ORDERED** that the above-entitled and numbered cause be, and it hereby is, **RETURNED** to the District Court for all purposes.

It is so **ORDERED**.

**SIGNED** November 7, 2006.

/s/ John W. Primomo
JOHN W. PRIMOMO
UNITED STATES
MAGISTRATE JUDGE

# APPENDIX C

## UNITED STATES DISTRICT COURT
## WESTERN DISTRICT OF TEXAS
## SAN ANTONIO DIVISION

| | | |
|---|---|---|
| **MICHAEL MARTINEZ TRUJILLO,** | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | **Civil Action No. SA-06-CA-0577-OG** |
| **NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Inst. Division,** | ) | |
| **Respondent.** | ) | |

## ORDER

(Filed Jan. 12, 2007)

Pending before the Court is the Memorandum and Recommendation of U.S. Magistrate Judge John W. Primomo (Dkt. # 11) and Petitioner's objections thereto (Dkt. # 13). The Court has reviewed the objections relating to ineffective assistance of counsel, conducted an independent review of those portions of the record relating to such objections, and has reviewed the applicable law. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The Court concludes that Petitioner's objections lack merit and are OVERRULED.

The Magistrate-Judge's recommendation is ACCEPTED, and the habeas petition is DENIED for

the reasons stated in the recommendation. This case may be closed upon entry of judgment.

SIGNED and ENTERED on the 11 day of January, 2007.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
UNITED STATES
DISTRICT JUDGE

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT of TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **MICHAEL MARTINEZ TRUJILLO,** | § | |
| **Petitioner,** | § | |
| **v.** | § | **Civil Action No. SA-6-CA-577-OG** |
| **NATHANIEL QUARTERMAN, Texas Department of Criminal Justice Correctional Institutions Division Director,** | § | |
| **Respondent.** | § | |

### ORDER

(Filed Apr. 16, 2007)

Petitioner Michael Martinez Trujillo's Notice of Appeal construed as a motion for certificate of appealability (Docket Entry # 16) to appeal the dismissal of his 28 U.S.C. § 2254 Habeas Corpus Petition is **DENIED** for the reasons stated in the Magistrate Judge's Report and Recommendation (Docket Entry # 11) adopted by this Court (Docket Entry # 14). Petitioner's Petition and appeal fail to make "a substantial showing of the denial of a federal right" as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel,* 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

**DATED:** April 14, 2007

/s/ Orlando L. Garcia
**ORLANDO L. GARCIA**
**UNITED STATES**
**DISTRICT JUDGE**

## APPENDIX E

### SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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### FOURTEENTH AMENDMENT

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the

district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

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28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(I) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such

determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

## APPENDIX F

STATE OF TEXAS
COUNTY OF BEXAR

My name is Alex Scharff. I am over 18 years of age and fully competent to make this affidavit. I am an attorney in good standing licensed to practice law in the State of Texas and have been since November of 1991. I am fully competent as I have personal knowledge of the facts contained herein.

I along with attorney Alan Brown represented Michael Trujillo on the direct appeal of Trujillo's conviction for capital murder in which he received an automatic life sentence. I combed the court reporter's record several times. I was immediately struck by the omission of an instruction in the court's charge on the defense of duress. It was clear from reading the record and talking to some witnesses that Trujillo only became involved in the incident because he was in imminent fear of his life or of imminent serious bodily injury from Danny Gonzales. There was enough evidence adduced at trial to establish a duress defense. However, the trial attorney, Todd McCray did not object to the charge and did not request such a defensive charge.

After I had read the record but before I had written the brief, I talked to Todd McCray one day while we were both in Judge Mary Roman's courtroom. McCray asked me how the appeal was going on Trujillo's case and if I thought he had made any mistakes. I told McCray that I thought that the jury

should have been instructed on the defense of duress. McCray paused and then agreed with me and seemed to curse himself for not raising the defense.

Based upon my reading of the statement of facts and talking to trial counsel, I am of the opinion that Trujillo did not receive the effective assistance of counsel at his trial. The failure of McCray to prosecute the duress defense was devastating error and caused me to have serious doubts about the validity of the verdict. His performance and errors was deficient and caused me to lose confidence in the outcome of the trial. Trujillo's defense was seriously prejudiced by McCray's ineffectiveness.

I swear and affirm that everything contained in this affidavit is true and correct.

/s/ Alex J. Scharff
ALEX J. SCHARFF

Subscribed and sworn before me on this 28th day of [June] 2005.

/s/ Cynthia A. Ybarra
NOTARY PUBLIC

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| [SEAL] | CYNTHIA ANN YBARRA<br>My Commission Expires<br>December 3, 2007 |